Supreme Court, U.S.
FILED
DEC 15 2015
OFFICE OF THE CLERK

Nos. 14-614 and 14-623

IN THE

Supreme Court of the United States

W. KEVIN HUGHES, *ET AL.*,
Petitioners,
v.
PPL ENERGYPLUS, LLC, *ET AL.*,
Respondents.

CPV MARYLAND, LLC,
Petitioner,
v.
PPL ENERGYPLUS, LLC, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC., IN SUPPORT OF PETITIONERS

GERALD NORLANDER, ESQ.
Counsel of Record
RICHARD BERKLEY, ESQ.
LISABETH JORGENSEN, ESQ.
PUBLIC UTILITY LAW PROJECT
OF NEW YORK, INC.
P.O. Box 10787
Albany, New York 12201
(518) 281-5991
gnorlander@utilityproject.org
Attorneys for Amicus Curiae

December 15, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

In 14-614, W. Kevin Hughes, et al. v. PPL EnergyPlus, LLC:

1. When a seller offers to build generation and sell wholesale power on a fixed rate contract basis, does the FPA field-preempt a state order directing retail utilities to enter into the contract?

2. Does FERC's acceptance of an annual regional capacity auction preempt states from requiring retail utilities to contract at fixed rates with sellers who are willing to commit to sell into the auction on a long-term basis?

In 14-623, CPV Maryland, Inc. v. PPL EnergyPlus, LLC, et al.:

1. Where, as a result of a state-directed procurement, the contract price to build and operate a power plant is the developer's bid price, and may result in payments beyond what the developer earns selling the plant's capacity in the FERC-supervised auction, is the program "field preempted" as a State's attempt to set interstate wholesale rates?

2. Is a state-directed contract to support construction of a power plant "conflict preempted" because its long-term pricing structure provides incentives different from the incentives provided by prices generated in the FERC-supervised yearly capacity auction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT	5
ARGUMENT	15
I. Plaintiffs Should Have Been Required to Exhaust Administrative Remedies at FERC Before Seeking Judicial Nullification of a FERC Jurisdictional Contract	15
II. Reversal of the Decision Below Will Not Lead to Dire Consequences	23
III. The Court Should Not Approve "Market Based Rates" for Wholesale Electric Capacity	26
CONCLUSION	31

TABLE OF AUTHORITIES

CASES	Page(s)
American Tel. & Tel. Co. v. FCC, 978 F. 2d 727 (D.C. Cir. 1992), *Aff'd sub nom. MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994)	13
Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U. S. 370 (1932)	12
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	22
Armour Packing Co. v. United States, 209 U. S. 56 (1908)	12
Atl. City Elec. Co. v. FERC, 295 F.3d 1 (D.C. Cir. 2002), *mandate enforced*, 329 F. 3d 856 (D.C. Cir. 2003)	23
Atl. Ref. Co. v. PSC of N.Y., 360 U.S. 378 (1959)	6, 27
Cal. Ex rel. Harris v. FERC, 784 F.3d 1267 (9th Cir. 2015)	1, 28
Cal. ex rel. Lockyer v. FERC, 383 F.3d 1006 (9th Cir. 2004), *cert. denied* 127 S.Ct. 2972 (2007)	28
Coral Power, L.L.C. v. Cal. ex rel. Brown, 551 U.S. 1140 (2007)	28
Conn. Dep't of Pub. Util, Control v. FERC, 569 F.3d 477 (D.C. Cir. 2009)	6
Colorado Office of Consumer Counsel v. FERC, 490 F.3d 954 (D.C. Cir. 2007)	28
Electrical District No. 1 v. FERC, 774 F.2d 490 (D.C. Cir. 1985)	6

TABLE OF AUTHORITIES—Continued

Page(s)

Elizabethtown Gas Co. v. FERC, 10 F.3d 866 (D.C. Cir. 1993) 28

Entergy La., Inc. v. La. PSC, 539 U.S. 39, 123 S.Ct. 2050 (2003) 2

ExxonMobil Oil Corp. v. FERC, 487 F.3d 945 (D.C. Cir. 2007) 15

Fed. Power Comm'n v. Texaco, Inc., 417 U.S. 380 (1974) 29, 30

FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956) 6

Louisiana Energy and Power Authority v. FERC, 141 F.3d 364 (D.C. Cir. 1998) 28

Maislin Indus. U.S. v. Primary Steel, 497 U.S. 116, 110 S.Ct. 2759 (1990) 7, 12, 13, 29

MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 114 S.Ct. 2223 (1994) 12, 13

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978) 2

Mont. Consumer Counsel v. FERC, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012) 28

Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527 (2008) 10, 19, 29

Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953 (1986) 2

TABLE OF AUTHORITIES—Continued

Page(s)

NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 558 U.S. 165 [2010] 19

PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D Md 2013) 20

PPL EnergyPlus, LLC v. Nazarian, 753 F3d 467 (4th Cir 2014) 20

Regular Common Carrier Conference v. United States, 253 U.S. App. D.C. 305, 793 F.2d 376 (1986) 11, 13, 29

Robinson v. Baltimore & Ohio R. Co., 222 U.S. 506 (1912) 12

Simon v. KeySpan Corp., 694 F.3d 196 (2d Cir. 2012) 3

Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907) 12

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) 8, 25, 26

United States v. Morgan Stanley, 881 F. Supp.2d 563 (S.D.N.Y. 2012) 3

United States v. Keyspan Corp., 763 F.Supp.2d 633 (S.D.N.Y.2011) 3

Verizon Communications Inc. v. FCC, 535 U.S. 467, 479 (2002) 8

STATUTES AND REGULATIONS

Federal Power Act (FPA), 16 U.S.C. § 824 *et seq.* .....*passim*

§ 205(a), 16 U.S.C. § 824d(a) 24

TABLE OF AUTHORITIES—Continued

Page(s)

§ 205(d), 16 U.S.C. § 824d(d) ..... *passim*

§ 206(e), 16 U.S.C. § 824d(e) 6, 8, 17, 31

§ 206, 16 U.S.C. § 824e(a) 6, 8, 14, 17

§304, 16 U.S.C. § 825(e) 13, 14

§ 313, 16. U.S.C. § 825l 14, 19

COURT RULES

Rule 24 of the Rules of the Supreme Court. 22

ADMINISTRATIVE DECISIONS

CPV Shore, LLC, 142 FERC ¶ 61,096 (2014) ..... *passim*

FERC Order 697, 119 FERC ¶ 61,295, *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities* (Issued June 21, 2007) 13

FERC, Order Denying Rehearing, *Enron Power Mktg., Inc.*, 106 FERC ¶ 61,024 (2004) 10

New York Independent System Operator, Inc., 122 FERC ¶ 61,211 3

State of New York Public Service Commission, Staff Report, Case No. 14-M-0565, *Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers* (June 1, 2015) 2, 5

TABLE OF AUTHORITIES—Continued

OTHER Page(s)

The Association of the Bar of the City of New York, Committee on Energy, *Electric Regulation in the State of New York* (Feb. 9, 2007), av'l at: http://www.nycbar.org/pdf/report/Dereg_report.pdf, last visited December 10, 2015 4

Cudahy, Richard D. *The Second Battle of the Alamo: The Midnight Connection*, ABA Natural Resources & Environment Journal, Vol. 10, No. 1 (Summer 1995).... 7

EIA, *Status of Electricity Restructuring by State*, U.S. Energy Info. Admin. http://www.eia.gov/electricity/policies/restructuring/restructure_elect.html (last updated Sept. 2010), last visited December 10, 2015 1

EIA, *Table 5.6.A. Average Retail Price of Electricity to Ultimate Customers by End-Use Sector,* U.S. Energy Info. Admin., http://www.eia.gov/state/data.cfm?sid=NY#Prices (Sept 2015) last visited December 10, 2015..... 2

FERC Office of Enforcement, Energy Primer: A Handbook of Energy Market Basics (2015), https://perma.cc/U9AG-K4M6..... 9

Kleit, Andrew N. Ph.D. & Robert J. Michaels, Ph.D., *Does Competitive Electricity Require Capacity Markets? The Texas Experience, available at* http://bit.ly/1lxjpaJ 8

TABLE OF AUTHORITIES—Continued

Page(s)

Mohler, Paul B. *Has The "Complete And Permanent Bond Of Protection" Provided By FERC Refunds Eroded In The Transition To Market-Based Rates?* 33 Energy Law Journal 41, 74 (2012)..... 3

Mount, Timothy Ph.D., *Problems with Capacity Markets: Why are Customers Paying so Much and Getting so Little in Return?*, Public Power, May-June 2007, *available at* http://www.publicpower.org /Media/magazine/ArticleDetail.cfm?Item Number=19300 4

PJM Manual 18: PJM Capacity Market Section 1: Overview of PJM Capacity Market PJM © 2015 5 Revision 29, Effective Date: 10/16/2015 http://www. pjm.com/~/media/documents/manuals/m 18.ashx 9

N.Y Utility Project, *Candle Fires and Monoxide Poisoning: Aftermath of "Rolling Blackouts" Interrupting Utility Service to Low-Income Households*, September 5, 2006, *available at* http://bit.ly/1ccUA..... 3

Richard Rosen, Max Duckworth, Aleksandr Rudkevich, *Modeling Electricity Pricing in a Deregulated Generation Industry: The Potential for Oligopoly Pricing in a Poolco*, Energy Journal, Vol. 19, No. 3, 1998, pp 19-48; IAEE..... 7

TABLE OF AUTHORITIES—Continued

Page(s)

Rokach, Joshua Z. *FERC'S Jurisdiction Under Section 205 Of The Federal Power Act*, 15 Energy Law Journal 83, 12 (1994)..... 22, 24

RTO Insider, FERC Commissioners at Odds over ISO-NE Capacity Auction, (Sept. 17, 2014), av'l here: http://www.rtoinsider.com/ferc-at-odds-iso-ne-capacity/, last visited December 10, 2015 27

Sample Market-Based Rate Tariff, available at. http:// www.ferc.gov/industries/electric/gen-info /mbr/tariff.asp..... 11

INTEREST OF AMICUS CURIAE[1]

The Public Utility Law Project of New York, Inc. ("Utility Project") is a nonprofit organization formed in 1981 to promote and defend the interests of low and fixed income utility consumers in matters affecting affordability, universal service, and consumer protection. The Utility Project educates the public about utility rates and charges, conducts research, and provides legal representation to enforce and defend the rights of residential utility consumers.

Residents of New York State received electric energy from vertically integrated utilities until the investor-owned utilities divested most of their power plants and formed new holding companies at the urging of the New York Public Service Commission in the late 1990's.[2] The restructured retail load serving

---

[1] No person other than the named amicus or its counsel authored this brief or provided financial support for it. All parties have consented to the filing of amicus briefs.

[2] The Unites States Energy Information Administration indicates fourteen states and the District of Columbia as "restructured", with the remainder of states under traditional state regulated vertically integrated monopoly providers. Seven states suspended restructuring plans. For a map with state-by-state information on electricity re-structuring, see *Status of Electricity Restructuring by State*, U.S. Energy Info. Admin. http://www.eia.gov/electricity/policies/restructuring/restructure_elect.html, (last updated Sept. 2010), last visited December 10, 2015. No state has restructured since the 2001 collapse and bankruptcy of Enron, a prominent proponent, amid market dysfunction, gaming and manipulation charges. See *Cal. ex rel. Lockyer v. FERC*, 383 F3d 1006, 1008-1009 (9th Cir 2004), *cert. denied* 127 S.Ct. 2972 (2007). See also, *Cal. Ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. April 29, 2015) (After 15 years, FERC still has not examined whether allegedly manipulated "market-based rates" and charges were reasonable).

utilities in New York now must purchase at wholesale nearly all the electric energy services they resell to end-use retail customers. Accordingly, regulation of wholesale interstate electric energy services by the Federal Energy Regulatory Commission (also "FERC" or "Commission") became even more important to New York customers.[3] New York residential customers now pay some of the nation's highest rates for electricity.[4] High electric rates are causing major hardship for low-income residential customers.[5] Many, due to unaffordable bills and indebtedness to utilities, are threatened with shutoff of essential electric service as a bill collection measure.[6]

---

[3] FERC-approved wholesale charges paid by load-serving utilities are passed through to retail customers under state regulated retail rates. *Entergy La., Inc. v. La. PSC*, 539 U.S. 39 (2003), *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986).

[4] The residential average price of electricity in New York in September 2015 was 18.44 cents per kilowatt hour, 5.51 cents/kwh above the national average of 12.93 cents/kwh. See spreadsheet showing the average price of electricity to consumers listed by State across all sectors, *Table 5.6.A. Average Price of Electricity to Ultimate Customers by End-Use Sector*, U.S. Energy Info. Admin., http://www.eia.gov/state/data.cfm?sid=NY#Prices (Sept 2015), last visited December 10, 2015.

[5] "As of April 30, 2015, there were 1,037,651 residential customers who were more than 60 days in arrears, carrying nearly $799 million owed to utilities; and 295,797 residential customers statewide had utility service disconnected for nonpayment during the preceding 12 months." State of New York Public Service Commission, Staff Report, Case No. 14-M-0565, *Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers*, p.4 (June 1, 2015).

[6] See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978). (Observing that "the uninterrupted continuity of [electric

Unnecessarily high wholesale prices for "capacity" add to the rate burdens of New York customers. The "bid-based" capacity auction prices such as those of PJM and the New York Independent System Operator ("NYISO") have been inflated due to defective market designs which allow high rates to be demanded and charged without regard to the bidders' actual costs, in contrast to other pool-type market models where clearing prices and efficient dispatch are based on sellers' publicly filed rates and auditable costs. In addition, market gaming may result in excessive charges,[7] for which there is no realistic consumer remedy at FERC.[8]

---

service] is essential to health and safety"). See also, N.Y. Utility Project, *Candle Fires and Monoxide Poisoning: Aftermath of "Rolling Blackouts" Interrupting Utility Service to Low-Income Households* (September 5, 2006), *available at http://bit.ly/1ccUAMs*.

[7] The use of financial derivatives to support gaming of the NYISO capacity market to increase prices went unremedied by FERC and antitrust enforcers. *United States v. Morgan Stanley*, 881 F.Supp.2d 563, 568 (S.D.N.Y 2012) ("Given the Government's stark allegations of manipulative conduct . . . a disgorgement of $4.8 million is a relatively mild sanction. There is a risk that a large financial services firm . . . could view such a modest penalty as merely a cost of doing business."); *United States v. Keyspan Corp.*, 763 F.Supp.2d 633, 636 (S.D.N.Y.2011). See *Simon v. KeySpan Corp.*, 694 F.3d 196 (2d Cir. 2012). (Holding that a private antitrust remedy for gaming of the NYISO capacity market was barred by the filed rate doctrine – even though the inflated rates and charges were not filed).

[8] New York Independent System Operator, Inc., 122 FERC ¶ 61,211, at P 147 (2008) (refusing to order refunds of increased prices due to gaming of NYISO capacity market by a seller who used a financial contract for differences to support an economic withholding strategy to drive market clearing prices up to the maximum); also see Paul B. Mohler, *Has The "Complete And Permanent Bond Of Protection" Provided By FERC Refunds*

Both the PJM and NYISO capacity markets have been dysfunctional in that their market price signals, despite enormous additional cost to consumers, have not induced the construction of new power plants in capacity constrained zones without long term contractual commitments and state support.[9] Since the 1999 advent of the NYISO, most of the new generation capacity in capacity constrained zones has been built directly by the State of New York, by state regulated utilities, or by developers under bilateral contract with state regulated utilities.[10]

Eroded In The Transition To Market-Based Rates?, 33 Energy Law Journal 41, 74 (2012).

[9] "In New York City, hundreds of millions of dollars have been paid each year through the capacity market to the owners of existing generating capacity. In spite of this major expenditure, the financial incentives have not attracted new investment. The main accomplishment of these extra payments has been to increase the market value of the existing capacity. There is no obligation placed on generators in the NYISO capacity market to build new generating capacity when and where it is needed." Timothy Mount, Ph.D., *Problems with Capacity Markets: Why are Customers Paying so Much and Getting so Little in Return?*, Public Power, May-June 2007, *available at http://www.publicpower.org/Media/magazine/ArticleDetail.cfm?ItemNumber=19300.*

[10] "A common explanation of the absence of construction of new power plants is the reluctance of plant sponsors and lenders to finance the new plants in the restructured wholesale market on a "merchant basis," that is, without the economic support of long-term power supply agreements ("PSA"). This explanation is supported by the fact that virtually all additional generation facilities constructed recently have been backed by long-term PSAs, the use of public financing, or both." The Association Of The Bar Of The City Of New York, Committee on Energy, *Electric Regulation In The State Of New York*, at 3, Feb. 9, 2007, *available at* http://www.nycbar.org/pdf/report/Dereg_report.pdf.

The decision below undermines the ability of states and state regulated retail utilities to address high capacity charges and capacity shortages through long term bilateral contracts with sellers to support development of new capacity, consistent with state priorities for fuel or renewable energy resources, and needed to address high prices and shortages in constrained zones. Affirmance could discourage development of new capacity resources needed to achieve environmental goals which require long term contracts to support them. Affirmance may also perpetuate high capacity prices or increase them, causing serious harm to New York's residential customers, particularly those with low incomes already facing hardship, other rate increases, and decreased assistance in the form of low-income rates.[11]

Accordingly, this brief is submitted in support of Petitioners and in support of reversal of the decision of the Fourth Circuit.

STATEMENT

This is the latest in a growing queue of cases spawned by the Federal Energy Regulatory Commission's (FERC's) effort to selectively abandon the Federal Power Act ("FPA") price regulation paradigm of publicly filed rates and contracts for wholesale interstate

---

[11] Under a pending recommendation of the New York Public Service Commission Staff to revise low-income rates "more than 85 percent of Con Edison's low income program participants will receive a smaller discount than they currently receive." Consolidated Edison Company of NY, Inc. and Orange and Rockland Utilities, Inc., Comments on the State of New York Public Service Commission Staff Report, in Case No. 14-M-0565, *Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers*, p.7 (August 24, 2015).

electric service. A primary purpose of the FPA is the protection of consumers.[12] FERC is attempting to walk away from effectuating the FPA's goals, and morph into a market architect and overseer, with no real review of the deregulated wholesale prices and price increases actually charged by utilities in the "organized markets" it is fostering. The migration of sellers and their transactions from the statutory filed rate and contract paradigm to new deregulated platforms is being implemented in the PJM and NYISO regions through FERC-approved tariffs which establish rules for essentially deregulated "organized" energy and capacity auction markets run by these private grid operator utilities.

In the PJM and NYISO capacity markets, rates are set based on sellers' secret unfiled "bids" or rate demands.[13] All sellers are paid the same uniform

---

[12] *Atlantic Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 388 (1959); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 352 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 at 353 (1956); *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985). Under the statutory scheme, "[r]ates may be examined by the Commission, upon complaint or on its own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect. §§ 824d(e), 824e(a). Following a hearing, the Commission may set aside any rate found "unjust, unreasonable, unduly discriminatory or preferential," and replace it with a just and reasonable rate. §824e(a)." See also, *Conn. Dept. Of Pub. Util. v. FERC*, 569 F.3d 477 (D.C. Cir. 2009).

[13] Under the Federal Power Act, all changes in sellers' rates must be filed publicly in advance. 16 U.S.C. § 824d(d). Thus, a market-based system cannot be implemented by the regulator and regulated sellers simply by migrating transactions to a non-transparent deregulated platform based on secretly changed, unfiled and essentially unreviewable market rates. "'The skeleton of regulation remains; the flesh has been stripped away'

But it is the skeleton we are construing, and we must read

market clearing price – regardless of their costs, profits, fuel or generation source. Sellers are free to bid strategically, and not based on their costs.[14] The tariffs of PJM and NYISO which bind member utilities in their regions have made participation in their capacity markets mandatory for all sellers and buyers.[15]

Capacity markets are not ubiquitous,[16] and not all jurisdictions rely on secretly developed market-based

---

it for what it says." *Maislin Indus., U.S., Inc. v. Primary Steel*, 497 U.S. 116, 138 (1990) (citation omitted).

[14] See Richard Rosen, Max Duckworth, Aleksandr Rudkevich, *Modeling Electricity Pricing in a Deregulated Generation Industry: The Potential for Oligopoly Pricing in a Poolco*, Energy Journal, Vol. 19, No. 3, 1998, pp 19-48; IAEE.

[15] The California Public Utilities Commission rejected a mandatory capacity spot market like the one adopted by PJM: "[W]e find reason not to approve a centralized auction approach at this time. The same general approach has been in place in the eastern United States markets for several years, but we do not find that it is yet a proven, long-term success story." CAPUC Rulemaking 05-12-013, Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission's Resource Adequacy Requirements Program, *Decision On Phase 2 Track 2 Issues: Adoption Of A Preferred Policy For Resource Adequacy* (Filed December 15, 2005), available at: http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/118990-03.htm#P712_79319, citing *Maryland Public Service Commission, et al. v. PJM Interconnection, L.L.C.*, FERC Docket No. EL08-67-000, 124 FERC ¶61,276 (2008), and 127 FERC ¶61,274 (2009).

[16] Notably, Texas is a "restructured" state with no capacity market. Its wholesale electric service is not under FERC jurisdiction. See Richard D. Cudahy, *The Second Battle of the Alamo: The Midnight Connection*, ABA Natural Resources & Environment Journal, Vol. 10, No. 1 (Summer 1995). "The theoretical case for capacity markets is weak at best. Many of its arguments depend on oversimplified assumptions that are at

rates in centralized monopoly spot markets to allocate capacity resources. Secret bid-based uniform clearing price spot-market auctions like PJM's and NYISO's, are not addressed in the FPA. In contrast, sales at transparent bilaterally contracted long term rates clearly *are* allowed and anticipated in the language of the statute, and when publicly filed, become part of a utility's filed rate schedule.

'[I]n the Federal Power Act . . . Congress departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in rate setting, 16 U. S. C. § 824d(d) (Federal Power Act). . . . See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 338-339 (1956)". *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 479 (2002). Thus, for example, under the plain language of the FPA, all contracts and contracts affecting or related to rates and charges must be just and reasonable, 16 U.S.C. § 824; all contracts must be filed, 16 U.S.C. § 824d(d); and contracts are subject to modification by FERC, acting on its own or upon complaint of any person. 16 U.S.C. § 824d(e). Finally, under the Federal Powers Act § 205, "any rate, charge, or classification demanded, observed, charged, or collected" must be just and reasonable. 16 U.S. § 824e(a)

The PJM, NYISO, and NE ISO capacity spot markets are not residual markets to supplement bilateral contracts. Rather, under FERC-approved tariffs *all*

---

variance with reality.... A capacity market is an institution in which people have no choice but to trade a contrived good that has little or no economic value...." Andrew N. Kleit, Ph.D. & Robert J. Michaels, Ph.D., *Does Competitive Electricity Require Capacity Markets? The Texas Experience, available at* http://bit.ly/1lxjpaJ.

capacity is required to be sold to and bought from these new monopoly market operator utilities.[17] Simple negotiated bilateral contracts between sellers and buyers are no longer feasible and must be implemented through financial adjustments outside the PJM market, after market-based prices have been set. For example, to effectuate a bilaterally agreed upon price, the seller's revenues from its mandatory sales into the deregulated auction market must be financially trued up or adjusted with supplemental payments or credits so that total revenue equals the bilateral contract price.[18]

---

[17] Subject to some exceptions not relevant here, the PJM tariffs require all load serving entities to buy capacity sufficient to meet their peak day demand, and requires all producers to sell into the PJM spot market. PJM Manual 18: PJM Capacity Market Section 1: Overview of PJM Capacity Market PJM © 2015 5 Revision 29, Effective Date: 10/16/2015. Av'l at: http://www.pjm.com/~/media/documents/manuals/m18.ashx. See also, PJM 2014 Annual Financial Report,

"For the pool transactions in the PJM markets, flash title passes through PJM Settlement immediately prior to passing to the ultimate buyer and seller of the product" av'l here: http://www.pjm.com/~/media/about-pjm/newsroom/annual-reports/2014-financial-report.ashx.

[18] "Bilateral physical transactions conducted in RTOs are settled financially. Generators offer their power into the RTO markets, and load is served through the power dispatched by the RTO. The RTO then settles bilateral transactions based on the prices in the contracts and the prices that occurred in the RTO market." FERC Office of Enforcement, Energy Primer: A Handbook of Energy Market Basics (2015) at pg. 57, av'l here: https://www.ferc.gov/market-oversight/guide/energy-primer.pdf. This may explain why the seller and buyer in this case agreed to true up the seller's revenues from the sale of capacity into the PJM capacity market, (which regardless of the seller's bid, may fluctuate based on the price demanded by another market

"FERC's Innovations"[19] with spot market auctions and "market-based rates" are premised on the sale of FERC jurisdictional electric services at unfiled "market-based rates" and secret changes in rates demanded, supplanting the publicly transparent tariff filing and bilateral contracts recognized in the FPA. The "privilege"[20] of having "market-based rate" tariffs is given by FERC to sellers it deems to be incapable of exercising market power unilaterally.[21] Sellers with "market-based rate" permission are then excused from publicly filing with FERC the statutorily required advance notice of changes in rates and charges, and any agreements made under their "market-based rate" tariffs.[22] FERC granted such "market-based rate"

---

clearing seller), with the price bilaterally agreed to by the seller and buyer.

[19] Contrasting "FERC's Innovations" with the Federal Power Act's filed rate regulation paradigm, the Court termed the assumption underpinning FERC's "market-based rates" scheme – that sellers individually lacking market power would charge just and reasonable rates – to be "somewhat metaphysical." *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1,* 554 U.S. 527, 542 (2008).

[20] "The authorization to sell power at market-based rates . . . – as opposed to traditional, cost-based rates – is a privilege. . . ." Order Denying Rehearing, *Enron Power Mktg., Inc.*, et al., 106 FERC P 61,024, P 13 (2004).

[21] *Cal. ex rel. Harris v. FERC*, 784 F3d 1267, 1275 (9th Cir 2015) (Noting FERC's reliance on a simplistic market share screen to allow market-based rates, without assessing whether actual charges are reasonable).

[22] "(d) Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public

authority to Petitioner CPV, which submitted with its application a draft of the anticipated long term contract that was nullified by the Court below.[23]

FERC's model "market-based rate tariff" in pertinent part provides: "Rates. All sales shall be made at *rates established by agreement* between the purchaser and Seller".[24] Notwithstanding the plain requirement that all contracts be filed by sellers, filing of service agreements is not required by FERC for sellers with "market-based rates."

FERC eliminated the statutory contract filing requirement for sellers upon whom it has bestowed the privilege of "market-based rates,"[25] even though this

---

inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." 16 U.S.C. § 824d(d).

[23] *CPV Shore, LLC,* 142 FERC ¶ 61,096 (2014).

[24] Sample Market-Based Rate Tariff, (*emphasis added)* available at http://www.ferc.gov/industries/electric/gen-info/mbr/tariff.asp, last visited December 10, 2015. A "rate tariff" which simply says charges will be determined later by seller and buyer is not a "rate" at all, because it provides neither the price nor a formula for determining the price objectively. *Regular Common Carrier Conf. v. United States,* 793 F.2d 376, 380 (D.C. Cir. 1986). Moreover, the Federal Power Act expressly authorizes negotiated contract rates between sellers and buyers – as indicated in the "market-based rate tariff" - but the statute expressly requires all the privately negotiated contracts to be publicly filed and subject to public scrutiny, FERC review, possible modification and possible refund if not just and reasonable.

[25] "The requirements [that utilities] file their rates with the Commission and charge only the filed rate were the centerpiece

Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges:

> "[T]here is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination." *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440 (1907); see also *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506, 508-509 (1912).
>
> "The duty to file rates with the Commission, [the analog to § 203(a)], and the obligation to charge only those rates, [the analog to § 203(c)], have always been considered essential to preventing price discrimination and stabilizing rates." *Maislin Industries, U. S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990).
>
> Filing requirements "render rates definite and certain, and . . . prevent discrimination and other abuses." *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 384 (1932).
>
> Elimination of filing requirements "opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish". *Armour Packing Co. v. United States*, 209 U. S. 56, 81 (1908).

---

of the Act's regulatory scheme." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 220 (1994).

As the *Maislin* Court concluded, compliance with these provisions is "utterly central" to the administration of the Act." *Maislin Indus, U.S. v. Primary Steel*, 497 U.S. 116, 132 [1990], quoting *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (CADC 1986). See also, *MCI Telecomms. Corp. v. AT&T Co.*, 512 US 218, 230 (1994).[26]

FERC deems a rate change to have occurred when it grants an application for blanket "market-based rates", even though subsequent unfiled price changes and charges established by subsequent agreement, or by sale into the PJM pool market, are implemented without filing.[27] FERC's evasion and elimination of the core advance filing requirement destroys transparency, negates the opportunity for timely public and agency scrutiny of rates and contracts, and undermines the opportunity to file administrative complaints under 16 USC 825e, which gives "any

---

[26] Reminiscent of the FCC forbidding the filing of tariffs by non-dominant carriers in the American Telephone & Telegraph case, *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 729-30 (D.C. Cir. 1992), *aff'd sub nom. MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994) FERC issued a regulation purporting to forbid the filing of contracts by sellers with "market-based rates." 18 CFR 35.1(g)). See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. ¶39,904, at para. 969-70 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007) ("Final Rule"), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055 at & 468-69 (2008).

[27] "[T]he rate change is initiated when a seller applies for authorization of market-based rate pricing." FERC Order 697, 119 FERC ¶ 61,295, *Market-Based Rates for Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities* at paras. 692, 72 Fed. Reg. 39,904 (Jul. 20, 2007).

person" an opportunity to challenge as illegal any action of a public utility under FERC jurisdiction.[28]

Had the CPV contract been executed and filed in accordance with the Federal Power Act, any objector, including the plaintiffs in this action, would have had a clear opportunity to protest any illegality or unreasonable facet of the agreement under the Federal Power Act, 16 U.S.C. § 824e(a), and then seek rehearing if aggrieved, and judicial review in the circuit court, under 16 U.S.C. § 825l. Rather than pursue administrative remedies at FERC, the plaintiffs brought this action in federal District Court against the Maryland Public Service Commission seeking to annul the state order that directed state regulated utilities to seek a seller who would satisfy the state established goals, on constitutional grounds. The principal effect of the lower court's judgment was to quash any contract between the power project developer, CPV, and the Maryland distribution utilities. In fact, when CPV eventually attempted to file its draft contract, FERC ruled that the judgment below had nullified it. *CPV Shore, LLC*, 142 FERC ¶ 61,096 (2014).

Amicus agrees with Petitioners' arguments in their merits briefs that the lower court erred in its holdings

---

[28] "Any person, electric utility, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee, transmitting utility, or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission." 16 U.S.C. § 825e.

on preemption. In addition, this case can be resolved without novel pronouncements on federal and state jurisdiction over electric service. Amicus demonstrates below that the lower court plainly erred when it assumed jurisdiction instead of dismissing the case based on the filed rate doctrine. The nascent contract nullified by the decision below, and the PJM capacity market tariffs, with which the contract allegedly would clash when it was executed, are within FERC's primary jurisdiction. It was plain error for the court below to indulge a collateral preemptive attack by parties who had not yet suffered any discernable injury, whose potential injury from the state-prompted contract had already been addressed by FERC, and who had a robust administrative remedy that was bypassed, in the mistaken view that the filed rate doctrine does not apply. Amicus also urges the Court, regardless of its ruling on the merits, not to approve FERC's "market-based rate" scheme.

ARGUMENT

I. PLAINTIFFS SHOULD HAVE BEEN REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES AT FERC BEFORE SEEKING JUDICIAL NULLIFICATION OF A FERC JURISDICTIONAL CONTRACT

It is basic that "[a] party must first raise an issue with an agency before seeking judicial review." *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952)). "This requirement . . . ensures 'simple fairness' to the agency and . . . provides this Court with a record to evaluate complex regulatory issues." *Id.* Plaintiffs did not seek FERC review of their grievances regarding the CPV

contact and instead commenced this action in federal district court challenging the state of Maryland's claimed wrongful intrusion into federal wholesale energy rate jurisdiction. The practical effect of the lower Court's decision was to quash a nascent contract agreed to by CPV, a seller of electric service.[29]

The controversial contract (the "Fixed/Indexed Price Contract for Differences" or "CfD") is under FERC's primary and exclusive jurisdiction because it affects or relates to the sale of interstate wholesale energy and capacity service. It is an essential part of a broader agreement between CPV Maryland, LLC, a power plant developer, and three electric distribution public utilities. Under the contract, CPV offered to build a costly power plant "and bid its output into a regional power market [the PJM market] for twenty years in exchange for fixed contract prices."[30] The agreements were fostered by the State of Maryland Public Service Commission, which directed distribution utilities under its jurisdiction to seek a willing seller (ultimately CPV).

Under the PJM capacity market rules, all PJM members who own capacity must offer it for sale to PJM, which then sets a clearing price based on secret unfiled rate demands or "bids." PJM then sells the amount of capacity needed by load-serving entities such as the contracting distribution utilities, who must buy it at the market clearing price. The only way to achieve an agreed-upon bilateral contract price

---

[29] FERC subsequently ruled that the judgment below had nullified the questioned contract. *CPV Shore, LLC,* 142 FERC ¶ 61,096 (2014).

[30] Brief for No. 14-614 Petitioners, pg. 2, filed December 8, 2015.

within the PJM framework was to have a contract – such as the CfD - to true up the seller's revenues from the auction market with the bilaterally agreed amount.

It appears that all parties now agree that FERC has jurisdiction over the contract at issue.[31] The courts below erred in contemplating the merits of the complaint and should have dismissed the case for failure to exhaust administrative remedies available at FERC. FERC has primary jurisdiction over contracts made by any public utility for wholesale interstate electricity services. The rates comprising the wholesale electricity market are examined by FERC, upon complaint or on its own initiative, whenever a new or altered tariff or contract is filed or after a rate goes into effect and "following a hearing, it may set aside any rate found "unjust, unreasonable, unduly discriminatory or preferential," and replace it with a just and reasonable rate".[32] Here, the CfD is "related to rates" because it is an agreement, the terms of which require truing up revenues CPV Maryland receives from the sale of capacity in the PJM wholesale market with the bilaterally agreed upon contract amount.[33]

---

[31] Although CPV initially claimed the CfD was not a contract related to its rates and charges, it attempted to file it after the courts below ruled. *CPV Shore, LLC,* 142 FERC ¶ 61,096 (2014).

[32] 16 USCS §§824d(e), and 824e(a). See *NRG Power Mktg., LLC v. Me. PUC*, 558 U.S. 165, 171 [2010].

[33] Clean Public CfD Contract including ICA, Section 2.6(d), "The Supplier shall participate in the BRA, the Day-Ahead Energy Market, Real-Time Energy Market, Ancillary Services Market or other markets as determined by the MDPSC in accordance with Section 3.2 of this Agreement, and the Facility meets all requirements in the PJM Agreements for BRA, the Day-

The federal rates with which the CfD allegedly interfered are the unfiled rates and rate changes established in the PJM capacity auction. Just like the controversial bilateral contract, the PJM capacity market rates are also subject to FERC's primary jurisdiction.[34] Thus the clash is between two "market-based rates": the seller CPV's "market-based rate", as determined by its unfiled bilateral contracts with buyers, and the unfiled "market-based rates" established under the PJM market rules contained in the PJM tariffs. As previously discussed, negotiated bilateral contract rates are explicitly recognized and allowed by the FPA, while market rates established in secret private auctions in which sellers are generally free to change their rates without notice are not mentioned or contemplated by the FPA.

The CPV contract says that the seller will abide by PJM tariffs and FERC rules.[35] If in fact the contract is inconsistent in any way with the PJM tariffs or FERC rules, then there is a clear remedy at FERC. That remedy must be sought and rehearing denied by FERC before a complainant may seek judicial review, which

---

Ahead Energy Market, Real-Time Energy Market, Ancillary Services Market or other markets, as laid out in the applicable PJM Agreements."

[34] "[T]he Commission claims authority to review the capacity charges that ISO-NE imposes on member utilities to ensure they are just and reasonable." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F3d 477, 483 (2009).

[35] "The contract provides: "The Supplier shall comply with applicable Law and the procedures, rules and regulations of PJM and the requirements of the PJM Agreements.... The Supplier will comply in full with all relevant and applicable FERC requirements." Jt. App. 390-91.

is required to be in a circuit court and not the district court. 16 U.S.C. § 825l.

Despite those readily available statutory remedies, Plaintiffs bypassed FERC's comprehensive administrative complaint procedure and elected to lodge a federal court complaint challenging the Maryland PSC order that spawned the as-yet unexecuted contract on constitutional grounds. This short-circuited any opportunity for FERC to harmonize the clash between the two market-based rates, perhaps by modifying the contract.[36] Also, based on a fuller exploration of issues in a proceeding to review the CPV contract and rates, FERC might have gained new insight and taken steps to further modify the PJM capacity auction market rules.

Intervenor-Defendant CPV Maryland argued in the court below that the contract for differences element of the agreements between CPV and the utilities is "purely a financial contract"[37] over which FERC has no

---

[36] Even if success in challenging the contract might be difficult for Plaintiffs, under this Court's rulings in *NRG Power Mktg., LLC v. Maine PUC*, 558 U.S. 165 (2010) and *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008) (Presuming that bilateral contracts for electric service are reasonable), that is not justification for bypass of the administrative remedy. Nor can it be assumed that a formal complaint actually adjudicated by FERC on the record of a contested proceeding would be futile, even though FERC has filed briefs in this and other similar cases supportive of preemption. In a complaint proceeding at FERC the process might arrive at just and reasonable rates, or narrow issues eventually ripened for judicial review in the circuit court, without the necessity for potentially far-reaching constitutional rulings that may have adverse consequences.

[37] Intervenor-Defendant CPV Maryland Memorandum of Points and Authorities in Support of its Motion to Dismiss [Docket 43]

jurisdiction. Based on the evidence presented at trial, including expert testimony, the district court disagreed and held that the contract was not purely financial and therefore, within the bounds of FERC's jurisdiction.[38] However, the district court further held that while its "finding that the Generation Order is field preempted raises the implication that the CfD, standing by itself, is a FERC-jurisdictional contract as opposed to a purely financial arrangement that is generally considered outside the purview of FERC, such an implication does not strip this Court of jurisdiction to decide the constitutionality of the PSC's regulatory actions and to enjoin enforcement of an unconstitutional state action."[39] The Fourth Circuit affirmed the decision and rejected outright that it lacked jurisdiction on the basis of the filed rate doctrine because a judicial determination would not require the court "to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question."[40]

The courts below erred in their disregard of the filed rate doctrine. The major thrust of the complaint was to nullify the nascent contract. Once the courts found that the contract was FERC jurisdictional, they should have dismissed the action for failure to exhaust administrative remedies. To be sure, the Plaintiffs sneakily pleaded around this obvious problem by

---

at pg. 29 and Intervenor-Defs.' Post-Trial Br. [Document 146] at 19-20, 22.

[38] *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 834 (D Md 2013).

[39] *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 839 (D Md 2013).

[40] *PPL EnergyPlus, LLC v. Nazarian*, 753 F3d 467, 474, n 1 [4th Cir 2014].)

suing the state for instigating the contract alleging constitutional violations and avoiding statutory claims. But where there is a comprehensive administrative review process, a party cannot avoid it by pleading for declaratory and injunctive relief on constitutional grounds, rather than waiting for the contract to be executed and seeking FERC modification of it in a FPA complaint proceeding. Significantly, the courts below rejected the Plaintiffs' claim for injunctive and declaratory relief under 42 U.S.C. § 1983 for alleged Supremacy Clause violations.

This Court should reject the underlying premise the Fourth Circuit used to assume and exercise its jurisdiction without invoking the filed rate doctrine and requiring exhaustion of remedies at FERC. Although literally true, there was no filed rate because under FERC's "market-based rates" regime *no* rates or contracts are filed, the decision to adjudicate the matter was plainly in error. As discussed above, both the controversial contract and the market rates with which it is allegedly inconsistent are FERC-jurisdictional rates, contracts, and rate changes. The Commission's abdication of the rate filing function does not destroy its primary jurisdiction over contracts that should be filed, and does not give license to plaintiffs to avoid the filed rate doctrine and seek far-reaching relief in the first instance in federal district court.

Rather, when rates or contracts should be but are not filed, the remedy is to complain to FERC in the first instance, and for FERC to review and if necessary reform the unfiled rates and contracts so as to render

the charges just and reasonable in all respects.[41] FERC has full power retrospectively to modify and reform contracts relating to rates and charges, even *after* contracts have been performed, if they have not been timely filed.[42] There was no valid excuse for not exhausting remedies with FERC, and following the normal path of rehearing and judicial review established in the statute.

Therefore, it was plain error for the district court to rule on the constitutional merits of Respondents-Plaintiffs' complaint without first requiring them to exhaust their administrative remedies by properly filing a complaint with FERC under the Federal Power Act.[43] Notably, the contested contract provides that the seller will comply with the PJM tariffs, FERC's orders and rules[44], and so it would be appropriate for plaintiffs to identify some particular violation and

---

[41] "[T]he 'filed rate doctrine' forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority. * * * * The considerations underlying the doctrine are *preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.* * * * *". *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 - 578 (1981) (*emphasis added*).

[42] Joshua Z. Rokach, *FERC'S Jurisdiction Under Section 205 Of The Federal Power Act*, 15 Energy Law Journal 83, 121 (1994).

[43] Rule 24 of the Rules of the Supreme Court provides that the Court "may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."

[44] The Contract para. 3.3 provides: (a) The Supplier shall comply with applicable Law and the procedures, rules and regulations of PJM and the requirements of the PJM Agreements.... (c) The Supplier will comply in full with all relevant and applicable FERC requirements."

attempt to convince FERC of that before launching a broad constitutional and preemption attack. By allowing Respondents-Plaintiffs to sidestep the administrative complaint scheme, the lower courts permitted a premature process of judicial review to nullify contracts related to the wholesale electricity market without FERC's review that was not intended by Congress.

Reversal of the decision below will preserve the proper functioning of the statutory scheme established in the Federal Power Act for setting wholesale rates for electric service. FERC, and not a federal court, should in the first instance decide if a contract clashes with the Federal Power Act, FERC regulations, FERC Orders, or is not in all respects just and reasonable, and FERC should initially decide how to resolve any conflicts. The decisions below could be reversed, without prejudice to the protest of any person who objects to the contract when it is executed and timely filed.

II. REVERSAL OF THE DECISION BELOW WILL NOT LEAD TO DIRE CONSEQUENCES

The Federal Power Act determines the sphere of federal interests in the electricity industry, and the scope of FERC's powers.[45] As stated above, concerns

---

[45] "As a federal agency, FERC is a "creature of statute," having "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. * * * * Thus, if there is no statute conferring authority, FERC has none. * * * * In the absence of statutory authorization for its act, an agency's "action is plainly contrary to law and cannot stand." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002), *mandate enforced*, 329 F. 3d 856 (D.C. Cir. 2003) (*citations and quotation omitted*). Also see *Cal. Indep. Sys. Operator Corp. v. FERC*, 372

raised by respondents-plaintiffs in this litigation about the impact of the disputed contract on FERC jurisdictional rates could be resolved by FERC, even after reversal of the judgment below. Section 205 of the Federal Power Act specifically provides for the regulation of contracts of public utility sellers of electric energy,[46] and it does not regulate buyers.[47]

The decisions below fail to recognize a basic principle of the Federal Power Act that in general, a seller is free to enter into any bilateral contract it chooses so long as it complies with the Act. As the Court has stated:

> [E]xcept as specifically limited by the Act, the rate-making powers of [sellers] were to be no different from those they would possess in the

---

F3d 395, 396 (2004). (Holding FERC lack authority to unseat state-appointed CAISO board).

[46] "Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824d(a).

[47] The Complaint and the decision below unduly focus upon motivations of the Maryland Public Service Commission and its "Generation Order" which directed distribution utilities to seek bids for construction of a new power plant, with rates, terms and conditions specified by the state agency for the distribution utilities' purchase of electric services from the new plant over a twenty-year period. "The FPA gives the FERC jurisdiction over sales, not purchases and concentrates on the seller, not the purchaser." Joshua Z. Rokach, *FERC'S Jurisdiction Under Section 205 Of The Federal Power Act*, 15 Energy Law Journal 83, 121 (1994).

> absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers, or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer."

United Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 343 (1956). The limits of the Act are the substantive requirement that all rates demanded, charged and received, and all contracts and charges be just and reasonable, and the procedural requirement of public filing, with all rates subject to FERC review and revision for just and reasonableness. Reversal of the decision below would only support and effectuate the longstanding principle that bilateral contract rates can be set under the FPA.

The complaint and decision below were concerned about the impact on PJM prices. But PJM is a FERC jurisdictional public utility, so the prices for capacity it establishes and its market rules are under plenary FERC jurisdiction. In the PJM auction market, capacity prices are set based upon secret bids and unfiled changes in rates demanded, at variance with FPA Section 824d(d). There is no statutory requirement for all capacity to be sold at the market clearing price set in the capacity markets. In contrast, under the plain language of the Federal Power Act, each public utility is free to set prices for services by filing their individualized tariffs, or to enter into long term bilateral contracts which set a negotiated price with buyers and become part of the seller's filed tariff. Prices in unilaterally filed tariffs, the cost of self-supplied capacity, and the price set in bilateral contracts may be at prices other than the prices set for capacity in the PJM market.

If a utility fears that the rates set by others in their tariffs or bilateral contracts are not reasonable, they are free to file a protest with FERC. Or, if a seller believes that as a consequence of bilateral transactions, clearing prices in auction markets will be unduly depressed by entry of a new producer, that utility is free to renounce its "privilege" of having "market-based rates" and to file either new rates available to all takers or to file negotiated long term bilateral contracts with buyers at rates other than those of the short term PJM capacity market. Accordingly, reversal of the decision below will not interfere with progress or improvements in the efficient operation of the electric grid.

III. THE COURT SHOULD NOT APPROVE "MARKET BASED RATES" FOR WHOLESALE ELECTRIC CAPACITY.

The Court should decide this case without approving or implicitly ratifying FERC's "market-based rate" regime for the sale of electric capacity at essentially deregulated prices. The parties present a clash between two variants of unfiled "market-based rates" – one in which rates, charges, terms and conditions are fixed in a bilateral contract of a seller to whom FERC granted a "market-based rate" "privilege", and the other being the "market-based rates" set uniformly for all capacity sellers in the private PJM utility capacity auction market. The seller did not file an executed contract pursuant to FPA Section 205.[48] Likewise, the rates set

---

[48] The seller did submit a draft unexecuted contract with its application to FERC for an order granting permission to have deregulated "market-based rates" after litigation had been initiated. Nevertheless, a draft is not the contract filing required by FPA Section 824d(d). *United Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 343 (1956) (Noting that the statute "provides

in the private PJM capacity auction market are not publicly filed with FERC. Rather, changes in rates and charges demanded in that market are secretly made and privately established.

The Federal Power Act was intended to "afford consumers with a "complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Ref. Co. v. Public Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959). Migrating services and rates to a deregulated platform is not envisioned in the statute. This risks exposure of customers to unpredictable and excessive "market-based rates" for capacity set in secret spot market auctions with no consumer remedy when charges are excessive.[49] Maryland's effort to secure added capacity with long term price predictability would be fully consistent with the structure of the FPA, in its reliance upon a bilateral contract, if an executed contract had been filed by the seller.[50] FERC's "market-based rates" regime, which

---

not for the filing of "proposals"). Rather, rates, rate changes, and executed contracts filed by sellers are complete and self-effectuating, unless FERC acts to review and modify them.

[49] See RTO Insider, *FERC Commissioners at Odds over ISO-NE Capacity Auction*, September 17, 2014, http://www.rtoinsider.com/ferc-at-odds-iso-ne-capacity/, visited August 17, 2015. ("The [NE ISO's] eighth Forward Capacity Auction (FCA) resulted in a sharp price increase after nearly 3,000 MW of capacity submitted retirement requests.... The ISO said total capacity costs for 2017/18 would be $3.05 billion, almost double the previous high ($1.77 billion in 2009").

[50] The seller attempted to file the contracts, which had not been executed due to the intervening court decisions below. FERC rejected the filing because the contracts were a nullity due to the force of the unstayed orders that constitute the law of this case. *CPV Shore, LLC*, 148 FERC ¶61,096 (2014). Reversal of the decisions below should constitute a change of circumstance that would allow filing of executed contracts under Section 205,

dispenses with such filing, clashes with the plain language of FPA Section 824d(d), which requires advance public filing of rates and contracts with FERC. Its deregulatory regimen is premised upon dicta in a decision of the Court of Appeals for the District of Columbia, approving negotiated rates without addressing the filing requirements.[51] The

---

subject to protests of any party under Section 206. As previously noted, the filing of unexecuted "proposed" contracts is not what the FPA requires.

[51] The *dicta* regarding negotiated rates in *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993) is often cited as authority for FERC's "market-based rates" regime, but the issue of consistency with statutory filing requirements was not timely raised in that case and was never considered. The same *dicta* was relied upon in support of unfiled market rates for electricity in *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998). These two cases were the underpinning of FERC's defense of its deregulatory regime. The D.C. Circuit side-stepped the question whether "market-based rates" are consistent with the Federal Power Act in *Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007). The Ninth Circuit, in *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied, Coral Power, L.L.C. v. Cal. ex rel. Brown*, 551 U.S. 1140 (2007), relied on the D.C. Circuit's *Elizabethtown Gas* and *LEPA* decisions in holding the "market-based rates" were not unlawful "per se," but held that the regime could only be squared with the FPA if FERC monitored reasonableness of unfiled charges after they were made. The Ninth Circuit adhered to its *Lockyer* precedent when "market-based rates" were challenged in *Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012). Recently, the Ninth Circuit again required FERC to conduct its post hoc review of spot market charges on another remand. *Cal. Ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015) ("FERC abdicated its discretion by structuring the remand proceedings in a manner that prevented any meaningful review of sellers' failure to file transaction reports during the crisis").

Court below did not question the fundamental premise whether any unfiled "market-based rate" is permissible.[52] In analogous circumstances, the Court has struck down efforts of other regulatory agencies to deregulate in contravention of the filed rate regulation paradigm established by their governing statute. *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (FCC detariffing of non-dominant carriers); *Maislin Indus., U.S., Inc. v. Primary Steel*, 497 U.S. 116 (1990) (secret negotiation and collection of charges other than those publicly filed). See *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, (1974) ("the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act").

The Court has not yet squarely addressed the legality of FERC's market rate regime for wholesale electric energy. In *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 538 (2008), the Court stated "[w]e have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system, which is not one of the issues before us." *Id.*, 554 U.S. at 538, 128 S. Ct. 2733. The Court further stated: "We reiterate that we do not address the lawfulness of FERC's market-based-rates policy, which assuredly has its critics. But any needed revision in that policy is properly

---

[52] In *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 399 (1974), the Court stated that "Congress could not have assumed that 'just and reasonable' rates could conclusively be determined by reference to market price)"; *accord*, *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (1986) (Without [a rate contained in a tariff], for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory..., and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates").

addressed in a challenge to the policy itself...." *Id.* at 548, 128 S. Ct. 2733. The parties to this case do not question "market-based rates", but present rival claims as to whose "market based rates" take precedence – those of an unfiled bilateral contract or those set in the PJM private utility auction market based on secret rate demands and unfiled rate changes.

The Court should rule without approving or endorsing the unfiled rates and rate changes set in the private PJM utility auctions and without approving any unfiled "market-based rate" capacity contract. As the Court stated in analogous circumstances: "It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process." *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 400 (1974). As previously discussed, reversal of the decisions below without prejudice to the filing by CPV of an executed contract with FERC, subject to protests of any person, would preserve the principle of bilateral contracting embedded in the statute and the possibility of protest and review by FERC.

CONCLUSION

The Court should reverse the decision and order below, without prejudice to the filing by CPV of an executed contract with FERC pursuant to Section 824d(d) and subject to protest of any party and review by FERC under FPA Section 824d(e). Regardless of the outcome of the case, the Court should not approve or endorse "market based rates" for any electric service.

Respectfully submitted,

GERALD NORLANDER, ESQ
Counsel of Record
RICHARD BERKLEY, ESQ.
LISABETH JORGENSEN, ESQ.
PUBLIC UTILITY LAW PROJECT
OF NEW YORK, INC.
P.O. Box 10787
Albany, New York 12201
(518) 281-5991
gnorlander@utilityproject.org

Attorneys for Amicus Curiae

December 15, 2015